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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 DERRICK LAMAR MCKNIGHT,

Case No. 3:17-cv-00681-MMD-VPC

10 Petitioner,

ORDER

11 v.

12 WARDEN BAKER, *et al.*,

13 Respondents.

14 **I. SUMMARY**

15 Petitioner has paid the filing fee. The Court has reviewed the petition pursuant to
16 Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.
17 The Court will dismiss some grounds. The Court will serve the petition upon respondents
18 for a response to the remaining grounds.

19 **II. BACKGROUND**

20 Petitioner and a co-defendant were tried in state district court. The jury found
21 petitioner guilty of burglary, conspiracy to commit robbery, robbery with the use of a deadly
22 weapon, and first-degree murder with the use of a deadly weapon. Under NRS
23 § 175.552(1)(a), the jury set the penalty for first-degree murder at life imprisonment without
24 eligibility for parole.¹ The state district court judge set the remaining penalties. (ECF No.
25 1-1 at 28.) Petitioner's direct appeal and state post-conviction habeas corpus petition
26 were unsuccessful.

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28 ¹The jury sentenced the co-defendant, Burnside, to death. (ECF No. 1-1 at 67 n.1.)
The prosecution did not seek the death penalty for petitioner.

1 **III. DISCUSSION**

2 For grounds 1 through 11, petitioner has copied his opening brief on direct appeal.

3 Ground 4 is a claim that the trial court erred when it denied petitioner's motion to
4 impanel a separate jury and alternative motion to sever his trial from the co-defendant's
5 trial. A joint trial with petitioner, for whom the prosecution was not seeking the death
6 penalty, and the co-defendant, for whom the prosecution was seeking the death penalty,
7 does not violate the Sixth Amendment's right to trial by an impartial jury. *See Buchanan*
8 *v. Kentucky*, 483 U.S. 402 (1987).² Ground 4 is without merit on its face.

9 Ground 7 contains three claims that the trial court gave erroneous instructions. Two
10 claims are without merit.

11 Ground 7(1) is a claim that the trial court instructed the jury that robbery was a
12 general intent crime, and he argues that robbery should be considered a specific intent
13 crime.³ This is purely a matter of state law that does not implicate either the Constitution
14 or the laws of the United States. *See* 28 U.S.C. § 2254(a). Ground 7(1) is without merit
15 on its face.

16 Ground 7(3) is a claim that the jury instruction defining reasonable doubt is
17 unconstitutional. The Court of Appeals for the Ninth Circuit has held that it is constitutional.
18 *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir. 1998). Ground 7(3) is without merit on its
19 face.

20 Ground 8 contains three claims that the trial court gave erroneous instructions. One
21 claim is without merit.

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25 ²In the direct-appeal brief, which petitioner has copied for his petition, appellate
26 counsel acknowledged *Buchanan* but tried to convince the Nevada Supreme Court to rule
27 otherwise.

28 ³In the direct-appeal brief, appellate counsel acknowledged that under state law
robbery is a general intent crime but nonetheless argued that the Nevada Supreme Court
should rule that robbery is a specific intent crime.

1 Ground 8(B) claims that the instruction defining premeditation and deliberation
2 blurred the distinction between the two elements of first-degree murder. Petitioner alleges
3 that this instruction was given:

4 Premeditation is a design, a determination to kill distinctly formed in the mind
5 by the time of the killing.

6 Premeditation need not be for a day, an hour, or even a minute. It may be
7 as instantaneous as successive thoughts of the mind. For if the jury believes
8 from the evidence that the act constitution [sic] the killing has been preceded
9 by and has been the result of premeditation, no matter how rapidly the act
10 follows the premeditation, it is premediated.

11 (ECF No. 1-1 at 58.) In *Byford v. State*, 994 P.2d 700 (Nev. 2000), the Nevada Supreme
12 Court noted that earlier jury instructions defining premeditation, deliberation, and
13 willfulness blurred the distinctions between these three elements of first-degree murder.
14 The Nevada Supreme Court then set forth the correct instructions to give to juries. The
15 premeditation instruction that the jury received in petitioner's case is the instruction that
16 the Nevada Supreme Court set forth in *Byford*. *Id.* at 714. Ground 8(B) is without merit
17 on its face.

18 In ground 10, petitioner alleges that during the penalty phase of the trial the state
19 district court allowed the jury to hear evidence that petitioner had committed another
20 murder, but that murder case was pending at the time. "Other than the fact of a prior
21 conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
22 maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*
23 *v. New Jersey*, 530 U.S. 466, 490 (2000).

24 [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence
25 a judge may impose *solely on the basis of the facts reflected in the jury*
26 *verdict or admitted by the defendant.* . . . In other words, the relevant
27 "statutory maximum" is not the maximum sentence a judge may impose after
28 finding additional facts, but the maximum he may impose without any
additional findings.

26 *Blakely v. Washington*, 542 U.S. 296, 303-304 (2004) (citations omitted) (emphasis in
27 original). The sentence that the jury imposed, life imprisonment without eligibility for

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1 parole, is within the statutory limits for first-degree murder. See NRS § 200.030(4)(b).
2 There was no violation of *Apprendi*. Ground 10 is without merit on its face.

3 Ground 12 concerns petitioner's state post-conviction habeas corpus petition. He
4 filed a petition in the state district court, but he did not allege any grounds. Instead, he
5 asked the state district court to appoint counsel to develop claims of ineffective assistance
6 of trial counsel. The state district court did not appoint counsel, and the state district court
7 denied the petition because petitioner did not allege any grounds. On appeal, the Nevada
8 Supreme Court affirmed. (ECF No. 1-1 at 83-84.) Now, petitioner alleges that his claims
9 of ineffective assistance of trial counsel are procedurally defaulted, in contravention of
10 *Martinez v. Ryan*, 566 U.S. 1 (2012), which held:

11 [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-
12 counsel claim in a collateral proceeding, a prisoner may establish cause for
13 a default of an ineffective-assistance claim in two circumstances. The first
14 is where the state courts did not appoint counsel in the initial-review
15 collateral proceeding for a claim of ineffective assistance at trial. The second
16 is where appointed counsel in the initial-review collateral proceeding, where
17 the claim should have been raised, was ineffective under the standards of
Strickland v. Washington, 466 U.S. 668 (1984). *To overcome the default, a
prisoner must also demonstrate that the underlying ineffective-assistance-
of-trial-counsel claim is a substantial one, which is to say that the prisoner
must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell*,
537 U.S. 322 (2003) (describing standards for certificates of appealability to
issue).

18 *Id.* at 14 (emphasis added).

19 Ground 12 has two problems. First, petitioner has not alleged in the current federal
20 petition any claims of ineffective assistance of trial counsel. Non-existent claims of
21 ineffective assistance of trial counsel are not procedurally defaulted, and they are not
22 substantial. They simply do not exist. Petitioner cannot use *Martinez* to overcome a
23 procedural default of his claims of ineffective assistance of trial counsel because he has
24 no claims of ineffective assistance of trial counsel.

25 Second, to the extent that petitioner is claiming that the state courts denied him his
26 right to appointed counsel in the state post-conviction proceedings, he is wrong. *Martinez*
27 did not create a constitutional right to appointed counsel in state post-conviction
28 proceedings, and the rule remains that petitioner has no such right. *Coleman v.*

1 *Thompson*, 501 U.S. 722, 752 (1991). Without that right, petitioner at best has alleged an
2 error in the state post-conviction proceedings. “[A] petition alleging errors in the state post-
3 conviction review process is not addressable through habeas corpus proceedings.”
4 *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989); see also *Gerlaugh v. Stewart*, 129
5 F.3d 1027, 1045 (9th Cir. 1997). Ground 12 is without merit on its face.

6 Petitioner also has filed a motion for appointment of counsel. Whenever the court
7 determines that the interests of justice so require, counsel may be appointed to any
8 financially eligible person who is seeking habeas corpus relief. 18 U.S.C.
9 § 3006A(a)(2)(B). “[T]he district court must evaluate the likelihood of success on the
10 merits as well as the ability of the petitioner to articulate his claims pro se in light of the
11 complexity of the legal issues involved.” *Weygandt v. Look*, 718 F.2d 952 (9th Cir. 1983).
12 There is no constitutional right to counsel in federal habeas proceedings. *McCleskey v.*
13 *Zant*, 499 U.S. 467, 495 (1991). The factors to consider are not separate from the
14 underlying claims, but are intrinsically enmeshed with them. *Weygandt*, 718 F.2d at 954.
15 After reviewing the petition, the Court finds that appointment of counsel is not warranted.

16 **IV. CONCLUSION**

17 It is therefore ordered that the Clerk of the Court file the petition for a writ of habeas
18 corpus.

19 It is further ordered that the Clerk of the Court file the motion for appointment of
20 counsel.

21 It is further ordered that the motion for appointment of counsel is denied.

22 It is further ordered that grounds 4, 7(1), 7(3), 8(B), 10, and 12 of the petition are
23 dismissed.

24 It is further ordered that the Clerk add Adam Paul Laxalt, Attorney General for the
25 State of Nevada, as counsel for respondents.

26 It is further ordered that the Clerk electronically serve upon respondents a copy of
27 the petition and this order. In addition, the Clerk must return to petitioner a copy of the
28 petition.

1 It is further ordered that respondents have forty-five (45) days from the date on
2 which the petition was served to answer or otherwise respond to the petition.
3 Respondents must raise all potential affirmative defenses in the initial responsive
4 pleading, including untimeliness, lack of exhaustion, and procedural default. Successive
5 motions to dismiss will not be entertained. If respondents file and serve an answer, then
6 they must comply with Rule 5 of the Rules Governing Section 2254 Cases in the United
7 States District Courts, and then petitioner has forty-five (45) days from the date on which
8 the answer is served to file a reply. If respondents file a motion, then petitioner will have
9 fourteen (14) days to file a response to the motion, and respondents will have seven (7)
10 days from the date of filing of the response to file a reply.

11 It is further ordered that, notwithstanding Local Rule LR IC 2-2(g), paper copies of
12 any electronically filed exhibits need not be provided to chambers or to the staff attorney,
13 unless later directed by the Court.

14 DATED THIS 21st day of May 2018.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE